No. 85-782

In The
Supreme Court of the United States
October Term, 1985

Immigration and Naturalization Service,
Petitioner,
v.
Luz Marina Cardoza-Fonseca,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Is there a difference between the "well-founded fear of persecution" standard applicable under Section 208(a) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a), and the "clear probability" standard applicable under Section 243(h) of the Act, 8 U.S.C. § 1253(h)?

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BRIEF OF RESPONDENT

STATEMENT

The Respondent is a native and citizen of Nicaragua who last entered the United States as a visitor on June 25, 1979. She remained longer than her authorized stay, and thus deportation proceedings were instituted.

At a hearing before an immigration judge on December 14, 1981, Respondent conceded deportability, applied

for asylum pursuant to Section 208(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1158(a), and applied for withholding of deportation pursuant to Section 243(h) of the Act, 8 U.S.C. § 1253(h).

Respondent testified that she holds a political opinion which is opposed to the Sandinista regime, although she was not politically active while living in Nicaragua. (Administrative Record, hereafter "AR", at 72 and 73) She believes that her opinion is likely to be brought to the attention of the authorities in Nicaragua because of her very close relationship with her brother. (AR 58, 59) During the Somoza regime, he was arrested and tortured because he was betrayed by his former Sandinista comrades. (AR at 34, 37, 40, 42) After this denunciation, Respondent's brother renounced his affiliation to the Sandinista movement, and publically criticized its progression towards communism. (AR at 38, 39, 40, 42) He subsequently came to the United States and applied for asylum. (AR 31)

Respondent fears that the Sandinista regime will now persecute her to retaliate against her brother, or in an attempt to extract information from her which the Sandinistas believe he has told her. (AR 50, 51, 55, 58, 59) Respondent's sister in Nicaragua advised her it was too dangerous for Respondent to return, and that the Sandinistas were still vigorously searching for their brother. (AR 58, 59)

The immigration judge found Respondent had failed to show a clear probability that she would be persecuted in Nicaragua. (Pet. App. 27a) Finding this to be the

standard for both asylum and withholding of deportation, he denied both requests. (Pet. App. 27a) The judge did find that Respondent merited the favorable exercise of discretion, and granted her the privilege of voluntary departure under section 244(e) of the Act, 8 U.S.C. § 1254 (e). (Pet. App. 27a)

The Board of Immigration Appeals (hereafter, "the Board") dismissed Respondent's appeal, agreeing with the immigration judge that she failed to establish a clear probability that she would suffer persecution within the meaning of either the asylum or withholding provisions of the Act. (Pet. App. 21a) The Board ignored Respondent's argument that the clear probability standard was the wrong standard to apply to the asylum request, and claimed that its conclusion would be the same whether it applied "a standard of 'clear probability', 'good reason', or 'realistic likelihood' " of persecution. (Pet. App. 21a)

The Court of Appeals reversed the Board's denial of asylum and remanded for further proceedings. (Pet. App. 1a-16a) It held that the well-founded fear standard, which an asylum applicant must satisfy, is meaningfully different from the clear probability standard applicable to withholding of deportation. (Pet. App. 4a-9a) The Court of Appeals rejected the proposition of the Board that "as a practical matter" the two standards actually "converge." (Pet. App. 11a) The Court held that where an applicant demonstrates a subjective fear of persecution which has an objective basis, the fear is considered well-founded. Unlike the requirement of the clear probability test, "the likelihood of persecution need not be greater than fifty percent." (Pet. App. 9a)

Therefore, the Court of Appeals found that the Board of Immigration Appeals erred by applying the clear probability standard of proof to Respondent's asylum application, and remanded the asylum claim for consideration under the proper legal standard. (Pet. App. 14a)

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SUMMARY OF ARGUMENT REASONS FOR DENYING CERTIORARI

The Court below defined the meaning of the "well-founded fear" standard applicable to requests for asylum under section 208(a), a definition previously left open by this Court in *INS v. Stevic*, 104 S.Ct. 2489 (1984). However, because that standard had never been applied to the underlying facts of the case, a remand was ordered.

The decision of the Ninth Circuit is correct, supported by the statute's plain language and the legislative history. It is also in accord with the decisions of several other Circuit Courts.

Although one Circuit Court disagrees with the Ninth Circuit and the other Circuits regarding the meaning of the legal standard, this case is not a proper one for this Court to consider. It is not ripe for review, and it does not present the issue in a fully developed context where the governing agency has actually applied the legal standard in question.

Rather than creating the administrative burden feared by Petitioner, declining to review this decision would be prudent, because the case does not now provide a good basis for review by this Court.

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ARGUMENT

I.

THIS CASE IS NOT YET RIPE FOR REVIEW NOR IS IT A PROPER VEHICLE TO RAISE THE QUESTION PRESENTED

Although the Petitioner correctly recognizes that a conflict exists amongst the circuit courts on the issue of the standard applicable to asylum claims, this is not a proper case to review that issue prior to the Board's decision on remand.

The Court below ordered a remand to the Board so it could apply the proper legal standard to the facts presented. Since neither the immigration judge nor the Board applied this standard previously, the facts of this case have never been assessed under it.

The propriety of deferring review by this Court until after remand has been recognized by this Court. In *Brotherhood of Locomotive Firemen and Enginemen, et al. v. Bangor & Aroostoor Railroad Co., et al.*, 389 U.S. 327, 328 (1967), this Court determined that "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court."

By its very nature, any request for asylum is inextricably bound to its individual facts. Therefore, perhaps unlike some other legal standards, the abstract articulation of the well-founded fear standard does not fully describe its import nor provide clear guidance for its practical use. No matter how well defined the standard may be in the abstract, the crux of its meaning can only be given life by its application to specific facts in a case by case analysis.

The need for review subsequent to a remand is especially compelling in this type of case, where the application of the proper legal standard to an intricate factual situation is central. Prior to a remand, the actual application of the standard would not be before this Court, and an important aspect of the standard would thereby escape review. Review by this Court now would be devoid of realism.

In this case, the well-founded fear standard has *never* been applied to the underlying facts. This Court should not deprive the Board of an opportunity to apply the standard. Any review prior to the actual application of the legal standard to the facts would result in an abstract, theoretical, and speculative exercise.

The Court of Appeals ordered a remand here to enable the Board to perform its duty of applying the proper legal standard to the facts. Thus, for the same reasons acknowledged by this Court in *Brotherhood of Locomotive Firemen and Enginemen, supra,* this case is not ripe for review.

When the Board does apply both the well-founded fear standard and the clear probability standard in a particular case, the resulting decision provides a far more thorough factual analysis than when it does not. In a lengthy opinion, the Board has already applied the standard as described by the Ninth Circuit. *Matter of Sanchez and Escobar,* — I&N Dec. —, I.D. #2996, (BIA October 15, 1985), *see also Matter of Gharadaghi,* — I&N Dec. —, I.D. #3001, (BIA November 1, 1985). *See also Garcia-Ramos v. INS,* 775 F.2d 1370 (9th Cir. 1985) (holding the applicant qualified for asylum but not withholding of deportation.) The painstaking detail with which the evidence was reviewed in these cases underscores the fact-bound nature of determinations in refugee cases. Such an analysis has never occurred here, thereby preventing review of the standard in any meaningful way. Therefore, this case is not the best vehicle for review of this intricate subject.

This Court can choose to defer its review of this case until after a decision on remand without prejudicing a later grant of certiorari, even in this very case. *Hamilton-Brown Shoe Co. v. Wolf Brothers & Company,* 240 U.S. 251, 257-8 (1916). Thus, review on a full record at a later date is not foreclosed.

Very simply, this case is not an appropriate one for review by this Court since it is not ripe. Because review of a legal standard prior to its application to the relevant facts is premature and unnecessarily abstract, the petition for certiorari should be denied.

II.

THE COURT BELOW CORRECTLY INTERPRETED THE LANGUAGE AND SCHEME OF THE REFUGEE ACT

Even a very brief discussion of the merits will demonstrate that the Court below was correct in its decision.

a. The existence of different standards of proof for asylum and withholding of deportation relief is in harmony with the statutory scheme of benefits and protections for refugees set out in the Immigration and Nationality Act.

The Petitioner argues that it is anomalous that the standard of proof for asylum is lesser than that required

to prove eligibility for withholding of deportation because asylum is the "broader relief." (Petition for Writ of Cert. at 9 and n.6) Petitioner's contention overlooks the fact that the difference in standards comports with both the logic and structure of the Act, important considerations discussed by the court below. (Pet. App. 6a-7a)

Withholding of deportation under section 243(h) is a mandatory form of relief for aliens who establish eligibility. *See INS v. Stevic,* 104 S.Ct. at 2497; *Bolanos-Hernandez v. INS,* 767 F.2d 1316, 1320 (9th Cir. 1985). But an alien who qualifies for asylum by meeting the definition of refugee in 8 U.S.C. § 1101(a)(42)(A), may nevertheless be denied relief in the exercise of discretion by the District Director, Immigration Judge, or Board of Immigration Appeals. *See* 8 U.S.C. § 1158(a). *See also Bolanos,* 767 F.2d at 1320.

It is not anomalous for the standard of proof to be higher where the applicant is making a claim of *entitlement* to relief, rather than a discretionary request. *See Caravajal-Munoz v. INS,* 743 F.2d 562, 575 (7th Cir. 1984). There is a sensible rationale for this result when viewed in the context of the actual situations in which the standards are applied.

Requiring a heavier burden for the mandatory relief is easy to understand when placed in the procedural setting where these cases arise. Take for example, an alien with a well-founded fear of persecution who applies for both forms of relief, but who must overcome an extremely adverse immigration history. To even reach the issue of withholding of deportation, the adjudicator would have already decided not to exercise discretion favorably. Such

a decision plainly demonstrates a determination that no relief is warranted besides that protection afforded by a humanitarian nation which finds it unconscionable to deport someone to a land where he would surely be persecuted. Having already decided not to grant any relief other than that which is absolutely necessary, it is logical that withholding of deportation is mandated only when the evidence presented meets the higher standard of clear probability.

Contrary to Petitioner's assertion, a lesser standard for asylum is both logical and consistent with the letter and spirit of the law.

b. The clear language of the statute provides different standards of proof for asylum applications and withholding of deportation requests.

The court below correctly noted that "[t]he plain terms of section 208(a) require applicants for asylum to demonstrate a "well-founded fear of persecution." *Cardoza-Fonseca v. INS,* 767 F.2d 1448 (9th Cir. 1985) (Pet. App. 5a)

This Court has never attempted to define the well-founded fear standard applicable to asylum claims. *Stevic* held that the correct standard of proof for withholding of deportation under section 243(h) was proof of a "clear probability" of persecution, although the Act itself provides no explicit standard. However, the Court assumed the well-founded fear standard is more generous. *See Stevic,* 104 S.Ct. at 2498, 2500-2501.

In deciding *Stevic,* the Court pointed out that section 243(h) does not refer to section 101(a)(42)(A), nor does it use the term "well-founded fear," or refer to refugees or asylees. *See Stevic* at 2498. Conversely, there is no

textual basis in the statute for concluding that the "clear probability" standard is relevant to an application for asylum under section 208(a).

Thus, by the very terms of the statute, Congress chose not to codify the clear probability standard into the newly added asylum provisions of section 208(a). The words Congress used to describe the standard of proof for asylum, "well-founded fear of persecution," indicate Congress intended a distinct standard. The words themselves are unambiguous in calling for both a subjective and objective component to the standard—"fear" being subjective, and "well-founded" implying some objective basis in reality. *See Stevic,* 104 S.Ct. at 2498 (discussion of several interpretations of the term "well-founded fear"). Such was the holding of the court below.

This extrapolation of meaning from the plain language of the statute is a proper judicial determination and is supported by the legislative history of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, et seq. (March 17, 1980). *See* discussion *infra.* The interpretation of the court below was clearly correct.

c. The Congressional intent demonstrates that the standard of proof for asylum claims is different from the standard applied to claims for withholding of deportation.

The provisions of section 208(a) of the Refugee Act provide the Attorney General with discretionary authority to grant asylum to any alien who qualifies as a refugee under section 101(a)(42)(A) of the Act. A refugee is defined in the Act as a person outside his native country who cannot return because of a "well-founded fear of

persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A).

Unlike section 243(h) which had predecessor provisions in U.S. immigration law for over thirty years, the enactment of section 208(a) established for the first time a statutory system for immigrant refugees within the United States to seek permission to remain on account of their well-founded fear of persecution. The amendment of section 243(h) by the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 197, was to conform our statutory law to international agreements. In accordance with this purpose, section 243(h) was amended to provide a mandatory rather than discretionary prohibition on refoulement, as required by Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150. *See Stevic,* 104 S.Ct. at 2496 n. 15. The new asylum provision, however, codifies a statutory scheme that looks to Article 1 of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, which is a separate and distinct provision.

The "well-founded fear of persecution" language was borrowed from the definition of "refugee" used in both the 1951 United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, and the 1967 United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577. Therefore, this language brought with it a long history of interpretation by the United Nations High Commissioner on Refugees (hereafter, "the U.N.H.C.R.") when it was incorporated into the Refugee Act of 1980. As this Court observed in *Stevic,* the refugee provision which contains the well-founded fear stand-

ard "[was] intended . . . to be construed consistently with the Protocol . . . ." 104 S.Ct. at 2499 (citations omitted). *See also Caravajal-Munoz v. INS,* 743 F.2d 562 (7th Cir. 1984).

Because Congress intended that the asylum provision be construed consistent with the Protocol, the courts have properly looked to materials interpreting the "well-founded fear" standard of the Protocol for guidance on the definition of that phrase as used in the Immigration and Nationality Act. *See Caravajal-Munoz,* 743 F.2d at 573-574. These interpretations plainly evidence a more generous burden of proof on the applicant for refugee status than that expressed by the "clear probability" standard of section 243(h). *See* the U.N.H.C.R. *Handbook on Procedures and Criteria for Determining Refugee Status* (1979), paragraphs 37, 38, and 39; the United Nations Report of the Ad-Hoc Committee on Statelessness and Related Problems, U.N. Doc. E/1618 and Corr. 1 (Feb. 17, 1950) at 39 ("well-founded fear . . . means that a person has either been actually a victim of persecution or can show good reason why he fears persecution.")

The interpretation of this standard set forth in the decision of the court below is consistent with the Congressional intent and United Nations Protocol. The position of the Petitioner here is not. *See* Amicus Brief of the Office of the United States High Commissioner for Refugees in *Stevic* at 25-28.

d. The Board's interpretation of the statutory term "well-founded" fear is inconsistent with the mandate of the Refugee Act, and is therefore not entitled to deference.

The Court below did not err by deciding not to defer to the Board's interpretation that the well-founded fear

standard for asylum is equivalent to the clear probability standard applicable to withholding of deportation.

The courts are the final authority on issues of statutory construction. *FTC v. Colgate Palmolive Co.,* 380 U.S. 372, 385 (1965). Even where an administrative agency is involved, the Administrative Procedure Act, 5 U.S.C. 551, et seq., requires the reviewing court to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706.

Deciding the meaning of a statute based on an agency's interpretation of a specific congressional intent is a "quintessential judicial function" and the agency's interpretation is not binding on the courts. *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority,* 464 U.S. 89, 98 n.8 (1983).

Because the Board's construction here is inconsistent with the statutory mandate and frustrates the congressional policy on refugees, the court need not defer to the Board's opinion. "[Reviewing courts] must not 'rubber stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute'." *Bureau of Alcohol, etc.,* 464 U.S. at 97, quoting *N.L.R.B. v. Brown,* 380 U.S. 278, 291-292 (1965). *See also Securities and Exchange Commission v. Sloan,* 436 U.S. 103, 117-118 (1978).

And where, as here, the agency's changing interpretations indicate an ambiguity in the language of the statute and its legislative history, it is proper for the court to decide the issue. *Process Gas Consumers Group v. U.S. Dept. of Agriculture,* 694 F.2d 778, 792, 224 App. D.C. 212

(D.C. 1982) (*en banc cert denied, La. v. Fed. Energy Reg. Comnsn.*, 461 U.S. 905 (1983).)

The Board's interpretation of this language has been far from consistent. Although the Board announced in *Matter of Dunar,* 14 I&N Dec. 310 (BIA 1973) that it believed that the clear probability of persecution standard it then applied was not different from the well-founded fear of persecution standard found in the 1967 Protocol Relating to the Status of Refugees, in practice, the Board's application of these standards of proof has varied considerably. *Compare Matter of McMullen,* 17 I&N Dec. 542, *rev'd on other grounds, McMullen v. INS,* 658 F.2d 1312 (9th Cir. 1981) (requiring proof of actual persecution), with *Matter of Salim,* 18 I&N Dec. 311 (BIA 1982) (requiring "objective evidence that [the applicant] has a well-founded fear that he is likely to be singled out for persecution . . . "), and *Matter of Sibrun,* 18 I&N Dec. 354, 358 (BIA 1983) (requiring that the alien "demonstrate a likelihood that he individually will be singled out and subjected to persecution.") The resulting pattern of inconsistent decisions demonstrates the absence of an informed Service position to which the courts might defer.

The fact that Petitioner claims that the well-founded fear standard and the clear probability standard are not materially different does not make it so. When the Board equates the two standards, it misconstrues the term "well-founded fear" and violates the clear intent of Congress.

e. The weight of authority supports the construction of this provision determined by the court below.

Following this Court's opinion in *Stevic,* four Circuit Courts of Appeal have defined the standard of proof to be

used for asylum claims made under 8 U.S.C. § 1158(a)(42)(A). Of the four circuits, three have agreed that the well-founded fear standard is more generous to the alien than the clear probability standard applied to requests for withholding of deportation. *See Cardoza-Fonseca v. INS,* 767 F.2d 1448 (9th Cir. 1985) (Pet. App. 1a-16a); *Bolanos-Hernandez v. INS,* 767 F.2d 1316 (9th Cir. 1985); *Argueta v. INS,* 759 F.2d 1395 (9th Cir. 1985); *Caravajal-Munoz v. INS,* 743 F.2d 562 (7th Cir. 1984); *Dolores v. INS,* 772 F.2d 223 (6th Cir. 1985); *Youkhanna v. INS,* 749 F.2d 360 (6th Cir. 1984). *Cf. Reyes v. INS,* 747 F.2d 1045 (6th Cir. 1984), *cert. den.* No. 84-6145 (April 22, 1985); *Dally v. INS,* 744 F.2d 1191 (6th Cir. 1984).

These courts, reviewing the very same considerations examined here, found that the plain meaning, congressional intent and humanitarian purpose of the Refugee Act of 1980 supported the conclusion arrived at by the court below. The decision below is correct.

III.

DECLINING TO REVIEW THIS DECISION WILL NOT IMPOSE THE SUBSTANTIAL BURDEN ALLEGED BY PETITIONER

Petitioner's claim that thousands of denials of asylum applications will be subject to attack should the Ninth Circuit's decision in this case stand is greatly exaggerated and should not eclipse the proper concern of this Court that only an appropriate case on the question presented should be selected for review.

Those cases which are still in the process of review, either before the Circuit Courts or the Board, will now

simply be evaluated using the proper standards. In fact, the Board has already done this without any of the difficulties the Petitioner would lead one to anticipate. *See Matter of Escobar and Sanchez,* — I&N Dec. —, I.D. #2996 (BIA October 15, 1985), and *Matter of Gharadaghi,* — I&N Dec. —, I.D. #3001 (BIA November 1, 1985). The Ninth Circuit has also demonstrated this can easily be accomplished. *See Garcia-Ramos v. INS,* 775 F.2d 1370 (9th Cir. 1985), where the Court found the applicant met the standard for asylum but did not qualify for withholding of deportation.

The Petitioner's argument that denial of review in this Court will create a rash of motions to reopen is specious. The vast majority of those applicants whose cases have been finally decided will have already left the country pursuant to grants of voluntary departure or deportation orders. Clearly, those applicants cannot now challenge previous determinations.

Moreover, administrative convenience surely does not outweigh the judicial considerations which determine whether review by this Court is warranted in a particular case. *See Haitian Refugee Center v. Smith,* 676 F.2d 1023, 1040 (5th Cir. 1982) (the administrative burden created by slowing the adjudication process in asylum cases does not tip the constitutional balance in favor of the government.) Administrative concerns are minor compared to the necessity of determining an issue in the context of a case which has been fully developed. Indeed, premature review can necessitate repetitive review of the same issue to clarify a holding in a later case.

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CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 1986